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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-880

HENRY KISSINGER, *et al.*,
Petitioners,

v.

MORTON HALPERIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is now reported at 606 F.2d 1192. On March 28, 1980, the district court denied without prejudice respondents' motion to disqualify Government counsel.

QUESTIONS PRESENTED

1. Whether a former President is absolutely immune from personal liability for violations of respondents' constitutional rights committed under color of his office when he is sued only after he has left office.

2. Whether federal officials not otherwise entitled to absolute immunity for violations of constitutional rights acquire such immunity by acting in concert with the President.

3. Whether federal officials who failed to obtain a judicial warrant and observe the reasonableness standard of the Fourth Amendment in conducting an electronic surveillance between 1969 and 1971 which was not related to legitimate national security interests should be held blameless under either the doctrine of qualified immunity or that of non-retroactivity.

STATEMENT OF THE CASE

1. **The Wiretap.**

On May 13, 1969, agents of the Federal Bureau of Investigation, acting at the direction of petitioners Nixon, Mitchell, and Kissinger, instituted a warrantless electronic surveillance on respondents' home telephone, which continued uninterrupted for twenty-one months. Although the purported purpose of the surveillance was to discover evidence of unauthorized "leaks" of classified information, no such evidence was ever gleaned from the wiretap. Indeed, as Kissinger testified and the district court found, the surveillance revealed nothing which cast the slightest doubt on Morton Halperin's loyalty or discretion. (Pet. App. 59a.) Not-

withstanding the fruitlessness of the surveillance, petitioners failed for twenty-one months to review its necessity or propriety. Furthermore, petitioners made no effort to limit the surveillance to the matters they were investigating, and consequently numerous conversations concerning personal and political matters were overheard, summarized, and disseminated.

The genesis of the surveillance occurred in April or early May of 1969 when petitioner Nixon, alarmed over the disclosure of sensitive national security information in newspaper stories, determined that a program of electronic surveillance should be undertaken to attempt to identify the source of these leaks. (Nixon Deposition, 17-23; Mitchell Deposition, 20-22) (hereinafter, "____ Dep. ____"). This determination was reached in consultation with petitioners Mitchell and Kissinger, and FBI Director Hoover. (Nixon Dep. 19; Mitchell Dep. 20.) Kissinger was directed by Nixon to provide names of individuals whom Kissinger thought might be potential "leakers." (Nixon Dep. 23, 84.) Nixon further directed that the surveillances were to be conducted by the FBI under the supervision of Attorney General Mitchell. (Nixon Dep. 24, 82-85; Mitchell Dep. 49.)

On May 9, 1969, responding to a story in the *New York Times* that set forth details about American B-52 bombing raids on Cambodia, Kissinger directed his military assistant, Col. Alexander Haig, to draw up a list of those who had access to information about the bombing campaign. (Haig Dep. 143.) Since Morton Halperin, then an assistant to Kissinger on the National Security Council staff, did not have access to the published information about the bombing campaign (J.A. 102),[1] Haig did not include Halperin on the list

[1] "J.A." refers to the joint appendix filed in the court of appeals.

which he prepared for Kissinger. (Haig Dep. 142-143.) Kissinger, however, instructed Haig to give to the FBI the names of four individuals who were not on Haig's list: Halperin, two other members of Kissinger's staff, and a military officer on duty in the office of the Secretary of Defense. Like Halperin, the other two NSC staff members had no access to the published information concerning the bombing operations. (Kissinger Dep. 32-36.) On the other hand, Kissinger listed none of the members of his staff who had complete access to that information. (*Id.*)

Kissinger later stated that the three members of is staff whose names he gave to Haig were individuals who others in the Administration had urged him not to hire. (Kissinger Dep. 10-11.) Halperin in particular had been the subject of strong letters to Nixon and Mitchell from Senator Barry Goldwater urging that Halperin and other hold-overs from the Johnson Administration not be retained. (J.A. 35-37.) Furthermore, according to Kissinger, petitioner Haldeman and the Chairman of the Joint Chiefs of Staff had raised objections over the hiring of Halperin. (Kissinger Dep. 7-8, 10.)

On May 10, 1969 Haig, acting on Kissinger's instruction, visited William Sullivan – then Assistant Director of the FBI in charge of the Intelligence Division – and requested electronic surveillance on the four individuals identified by Kissinger. (Haig Dep. 135-36; J.A. 51.) Haig and Sullivan also worked out procedures for the surveillance which varied considerably from those normally followed for warrantless national security surveillances and included a direction that no records be kept. (Mitchell Dep. 14; Belter Dep. 24; Jones Dep. 24; J.A. 38-45, 51.)[2]

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[2]Messrs. Belter and Jones, whose depositions are referred to

Sullivan forwarded Kissinger's request to FBI Director Hoover, who submitted a memorandum seeking the Attorney General's approval for the four surveillances. This memorandum (J.A. 52) did not include the statement, required by Justice Department regulations, of the activities in which the target of the surveillance was engaged or the type of information anticipated to be obtained from the wiretap. (J.A. 41.) Rather than indicating that there was any unfavorable information in Halperin's security file, the memo stated that a recent background investigation had not uncovered "any pertinent derogatory information." (J.A. 52.) Hoover, however, in a conversation with Kissinger on May 9, 1969, had characterized Halperin as one of the "so-called arrogant harvard-type Kennedy men" who remained in the government. (J.A. 50.)

On May 12, Mitchell signed the memorandum, thereby approving the surveillance. (J.A. 53.) In approving the surveillance, Mitchell did not direct the use of any procedures to minimize the interception of calls which had no relevance to the leak investigation. Moreover, neither Nixon nor Kissinger had given such instructions, and neither they nor Mitchell ever gave such an instruction. (Kissinger Dep. 37; Nixon Dep. 64-65; Sullivan Dep. 131.)

From May 13, 1969 to February 10, 1971 the wiretap was continuously in place on the Halperin home telephone.[3] Over the course of the twenty-one months of

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herein, are the FBI Special Agents who were responsible for supervising the Halperin surveillance.

[3]The logs of the surveillance show that there were earlier interceptions from May 9 to May 12, 1969. *See* Pet. 6. There is no explanation in the record for these interceptions prior to Mitchell's approval.

surveillance, FBI agents were under instructions to listen to all conversations (Belter Dep. 43-44, 57), and to record many of them. (Belter Dep. 92.) The FBI employees monitoring the phone prepared daily logs of some but not all of the conversations. (Belter Dep. 37-38.) The log entries ranged from verbatim texts of conversations to simple notations of the times of calls and the identity of the conversants. (Belter Dep. 39, 91.)

Most of the 638 calls logged were of a personal or political nature and were, as petitioners concede, not even remotely connected with the alleged purpose of the surveillance. (Haig Dep. 38; Nixon Dep. 133, 135; Haldeman Dep. 56; Kissinger Dep. 73-74.) 173 (27%) of these calls were between Mr. and Mrs. Halperin; 277 (43%) of the calls were between Mrs. Halperin – who had never had access to, or was alleged to be leaking, classified information – and third parties; only 182 of the logged calls (28%) were between Mr. Halperin and third parties. (J.A. 116.) The three Halperin children were each specifically identified once in the logs, and 13 other entries in the logs note calls involving unidentified children. (*Id.*) The remaining logged calls were between individuals who used the Halperin telephone and are not parties to this lawsuit.

Based on the material recorded in the logs, letters were prepared by the FBI, signed by Hoover, and addressed to both Nixon and Kissinger at the White House. (J.A. 56 and subsequent letters in record.) This practice continued for a year, after which the letters were sent only to Haldeman, who kept Nixon and Kissinger informed. (J.A. 75-77; Haldeman Dep. 49.) Copies of at least a few of the letters were also sent to Mitchell. (Mitchell Dep. 52.) Petitioners Nixon, Mitchell, Kissinger, and Haldeman were at least generally familiar with the contents of the letters either because they read

them or were briefed on them, and all discussed the contents with at least a few other individuals. All were aware that no information was being obtained relating to leaks and that much other information was being gathered and disseminated. (Haldeman Dep. 55, 56; Nixon Dep. 133, 135; Kissinger Dep. 73, 74, 88, 97; J.A. 57, 73-74.)

Thirty summary letters were provided by the FBI to the petitioners, many of which contained substantial amounts of information pertaining to political activities. Information included in the letters involved matters such as the private views of senators on the Vietnam war, development of a foreign policy position by Common Cause, and the activities of the Muskie presidential campaign. (J.A. 203-06.) In one instance, petitioners learned from the wiretap that Morton Halperin was assisting former Secretary of Defense Clark Clifford in writing an article for *Life Magazine* criticizing the Nixon Administration's Vietnam policy. (J.A. 64-65.) Petitioners then used this advance warning to plan a counter-attack to the Clifford article before it was published. (J.A. 66-72.)

The Halperin surveillance was initiated and continued during a period when Morton Halperin had little or no access to sensitive information. On May 9, 1969 – the same day that Kissinger selected Halperin for surveillance – Kissinger told Halperin that Halperin was suspected by others in the Administration of leaking the Cambodian bombing story. Kissinger and Halperin agreed that Halperin's access to very sensitive material would be cut off for a time so that he could not be accused of leaking. That access never resumed. (J.A. 102-05.) On September 19, 1969, Halperin, over the strong protest of Kissinger, resigned from the NSC staff. (Kissinger Dep. 59.) At that time, Kissinger at-

tempted to persuade Halperin to remain on the staff and offered to resume Halperin's full access to sensitive information. (*Id.*) At Kissinger's request, Halperin agreed to assume a consultant status with the NSC, which he maintained until the following May, but he had no access to any classified NSC information after resigning his full-time position. (J.A. 104.)

Despite Halperin's limited, and eventual absence of, access to sensitive information and the lack of any evidence that he was engaged in leaking, petitioners never reviewed the propriety of the Halperin wiretap. Indeed, they rejected suggestions from experienced officials of the FBI that the tap be terminated. As early as May 15, 1969, William Sullivan, who was directing the wiretap program for the FBI, notified Hoover that no information related to leaks had been uncovered. (J.A. 54.) On May 20, 1969, Kissinger visited Sullivan's office and told him that he wanted the surveillance on Halperin continued "for a while longer." (J.A. 55.) On June 4, 1969 Kissinger met with Hoover and suggested that the surveillance of Halperin continue for "at least another two weeks so that a pattern of innocence can be firmly established." (J.A. 57, 156.)

In mid-June, 1969 Haig, acting for Kissinger, agreed with Sullivan on the discontinuance of the wiretaps of some suspected leakers, but not the one on Halperin. (J.A. 58.) In July, 1969, Sullivan reported to Hoover that "nothing has come to light of significance from the standpoint of the leak in question." (J.A. 59.) On September 15, Kissinger told Haig to instruct the FBI to discontinue the surveillances then underway except for those on Halperin and one other person. (J.A. 60-61.)

In July, 1970, the FBI agent in charge of the surveillance wrote to Sullivan that he had not "noticed much info of value in recent months" and recommended that the wiretap be discontinued. (J.A. 78.) Finally on February 10, 1971, the wiretap was removed. (J.A. 83.)

Following the termination of the wiretap, various efforts were made to conceal the existence of the files relating to the wiretaps. (J.A. 210-13.) At Mitchell's direction, the records of the surveillance were taken out of the FBI without Hoover's knowledge and stored in the White House. The records remained secret until May, 1973 when the Acting Director of the FBI, William D. Ruckelshaus, learned of their existence and informed Judge Matthew Byrne, who was presiding over the trial of Daniel Ellsberg and Anthony Russo, *U.S.* v. *Russo,* No. 9373-C (C.D. Cal.). Because Ellsberg had been overheard on the Halperin wiretap, Judge Byrne ordered public disclosure of the surveillance on May 10, 1973. (J.A. 213-214.)

2. **District Court Proceedings.**

Shortly after learning of the surveillance, respondents filed this action against petitioners Kissinger, Mitchell, Haldeman, and others in June, 1973, alleging that the wiretap was unlawful under the First and Fourth Amendments and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Throughout the proceedings below, respondents have contended that the wiretap was initiated and continued for political purposes and never had a legitimate national security purpose.

Although petitioner Nixon had publicly announced on May 23, 1973 that he had authorized the entire wiretap

program, (J.A. 100), he was not named as a defendant when the suit was filed. During the summer of 1974, the Judiciary Committee of the House of Representatives voted to impeach petitioner Nixon. One of the articles of impeachment included the wiretap program in which respondents were caught up. The Committee's summary of evidence in support of Article II, paragraph (2) states: "The surveillance and investigations served no lawful purpose of his office: they had no national security objective, although he falsely used a national security pretext to attempt to justify them. Information obtained from this surveillance was used by his subordinates, with his authorization or permission, for his political advantage . . . ." Report of the House Committee on the Judiciary: Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146 (1974). On August 9, 1974, petitioner Nixon resigned from office, and on September 8, 1974, President Ford pardoned Nixon. Also, at that point in this litigation, several depositions had demonstrated that Nixon was an indispensable party to the case. It was only after all these events that respondents amended their complaint on September 30, 1974 to include Nixon as a defendant.

On cross motions for summary judgment the district court held that the surveillance was constitutionally unreasonable because of the failure to periodically review the surveillance or to minimize the interception of conversations. The Court declined to rule whether a warrant was required for the surveillance and held that the procedures required by Title III were inapplicable to the surveillance. The court found that petitioners Nixon, Mitchell, and Haldeman were responsible for the

surveillance and were not entitled to qualified immunity because "their activities relating to the wiretap continuance were in violation of established Fourth Amendment rights." (Pet. App. 73a.) It held that petitioner Kissinger and other defendants were not sufficiently involved in the surveillance to be liable for damages.[4] In a subsequent opinion the district court held that plaintiffs were only entitled to nominal damages of one dollar each since they had not alleged any physical or economic injury. (Pet. App. 55a-56a.)

3. The Court of Appeals Decision.

On cross appeals, the court of appeals held for respondents in all respects. It affirmed the district court decision that petitioners were not entitled to immunity for their failure to minimize the surveillance and specifically ruled that petitioner Nixon is not entitled to absolute immunity. On respodnents' appeal, the court reversed the grant of summary judgment as to Kissinger, holding that there were genuine issues of material fact concerning his role in initiating and maintaining the wiretap. Petitioners have not appealed this ruling. (Pet. 7 n.4.)

The court also reversed on the applicability of Title III and held that "Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities" and remanded for a determination of the purpose of the wiretap. (Pet. App. 28a.) It suggested that there was little evidence to support the

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[4]Respondents had previously agreed to dismiss certain defendants and did not appeal the dismissal of the remaining defendants except for Kissinger.

surveillance after May 1970 when Morton Halperin had no official connection with the government, particularly since the reports were sent to the President's political advisor. (Pet. App. 26a.) It noted that after Halperin left the NSC staff in September, 1969, the national security rationale "would seem almost equally attenuated." (Pet. App. 27a.) Finally, it directed the district court to examine respondents' contention that he was selected for surveillance to bolster the political credibility of Kissinger's staff appointments. (Pet. App. 27a-28a.)

The court of appeals also held that a warrant was required at the initiation of the surveillance and remanded for a determination of whether petitioners had a good faith defense for failure to obtain a warrant. With regard to the appropriate level of damages, the court directed that further proceedings be held, ruling that "even if a constitutional violation inflicts only intangible injury, compensation is still appropriate." (Pet. App. 33a.) Petitioners have not challenged this ruling on damages.

REASONS FOR DENYING THE PETITION

The petition should be denied because (1) no useful purpose would be served by granting *certiorari* on the questions presented because even if the Court were to rule in petitioners' favor, they will still face trial on the question of their liability under Title III, an issue which they have specifically declined to raise in this Court; (2) this is not an appropriate case to determine whether former Presidents enjoy a greater degree of immunity from liability for violations of constitutional rights than do cabinet officers or state governors; (3) the decision below with respect to presidential immunity is

correct because it properly applied this Court's decisions in *Butz* v. *Economou,* 438 U.S. 478 (1978), and *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); (4) there is no reason to consider the immunity issue as it relates to petitioners Kissinger, Mitchell, and Haldeman; and (5) the issues of qualified immunity as a matter of law and non-retroactively depend in part on facts yet to be established, and in any case these issues turn on facts and circumstances unique to this case and therefore are not worthy of this Court's review.

1. Even If This Court Rules In Petitioners' Favor On All Questions Presented, They Will Still Face Trial On The Title III Claims.

Petitioners have specifically stated that they "seek review only of issues relating to respondents' claim that petitioners are personally liable in money damages for the alleged constitutional violations" and do not seek review of the court of appeals decision on Title III. (Pet. 10-11 n.8.) Therefore, review of this case at this time would not constitute a prudent use of this Court's resources because even if it ruled in petitioners' favor on all questions presented, there will still be a trial on their liability under Title III.

In view of the inevitability of a trial on this claim, it would be a waste of the Court's time to consider petitioners' defense to the constitutional violations alleged. Indeed, if respondents prevail under Title III, there may be no need for any court to finally rule on the questions presented because recovery under the statute would preclude recovery under the Constitution. As the court of appeals noted, respondents cannot collect both statutory and constitutional damages for the same

periods of the surveillance. (Pet. App. 31a n.95.) If given the choice, they will elect to recover under 18 U.S.C. § 2520, which provides liquidated damages of $100 per day from each person who violated the statute, as well as punitive damages and attorneys fees. Thus, all of the questions presented by petitioners may well never figure in the ultimate outcome of this case. If they do, there will be time enough then for this Court's review.

2. This Is Not An Appropriate Case To Consider Whether Former Presidents Enjoy Absolute Immunity From Liability For Violations Of Constitutional Rights.

Petitioners treat the issue of presidential immunity in the abstract rather than in relation to the facts of this case. They warn that suits against Presidents could "stop the whole machinery of government" (Pet. 13); that courts will "conduct routine oversight" of the President's official duties (Pet. 15); and that the burdens of litigation threaten "serious interference with the President's conduct of office." (Pet. 17.) They also contend that this case demonstrates that it is a simple matter for "an aggrieved plaintiff to allege that the President had taken some official action with malicious intent" and thereby force an inquiry into his motives. (Pet. 17.)

The principal difficulty with these contentions is that they bear no relation to the facts of this case. Respondents sued petitioner Nixon only after he publicly took responsibility for the wiretap program, after the House Judiciary Committee corroborated respondents' allegations, after Nixon resigned from office, and after the record showed that he was an indispensable party. Indeed, in allowing respondents to depose the former President, the district court concluded that peti-

tioner Nixon was "uniquely capable of clarifying certain of [the] issues" which emerged from the depositions of more than twenty witnesses. 401 F. Supp. at 275. Moreover, petitioner Nixon's deposition has already been taken and he has provided respondents with documents and tapes of his conversations.[5] Everything that petitioners seek to prevent has already taken place — much of it with the acquiescence of the Government — and petitioners have not claimed one iota of demonstrable harm to the institutions of government resulting therefrom. Furthermore, the Government does not ask this Court to shield the former President from a trial on his liability under Title III.

Contrary to petitioners' assertions, this is not a case in which a President is sued for an official and otherwise lawful act which is alleged to give rise to a cause of action only because it was conducted maliciously. Here respondents alleged and the courts below found that the failure to obtain a warrant and to minimize the interception were unconstitutional on their face regardless of Nixon's motive or intention.

It is also significant that petitioner Nixon "resigned his office under unique circumstances and accepted a pardon for any offenses committed while in office. By so doing, he placed himself in a different class from all other Presidents . . . ." *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 486 (1977) (Mr. Justice Stevens, concurring). If this Court denies the petition, the decision of the court of appeals on the unique facts

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[5]Indeed, the Justice Department did not support Nixon — then represented by private counsel — when he sought a protective order to prevent his deposition from being taken and did not seek review by certification or mandamus of the district court's decision that he could be deposed.

of this case will not seriously interfere with the proper administration of the Executive Branch by the President. Few suits against sitting Presidents in their individual capacities will be filed, and courts will – as they have in the past – be quick to dismiss all but the strongest allegations of presidential misconduct.

3. The Court Of Appeals Decision On The Immunity Of Presidents Is Consistent With The Decisions Of This Court.

The court of appeals decision with respect to petitioner Nixon does not warrant review by this Court because it is entirely consistent with the decisions in *Butz* v. *Economou,* 438 U.S. 478 (1978), and *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), which held that cabinet officials and state governors are entitled to qualified rather than absolute immunity in suits arising from the violation of constitutional rights. The analysis employed by the court in *Butz* considered and rejected the argument made in this case on behalf of petitioner Nixon:

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects – including some which may infringe such important personal interests as liberty, property and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune

> simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.
>
> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> > "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

438 U.S. at 505-06, *quoting United States* v. *Lee,* 106 U.S. 196, 220 (1882). *See The Floyd Acceptances,* 74 U.S. (7 Wall.) 666, 676-77 (1868) ("We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority").

The Court has also ruled in *Scheuer* v. *Rhodes* that the governor of a state is entitled to qualified rather than absolute immunity, and in *Butz* has stated that "federal officials should receive no greater degree of protection from *constitutional* claims than their counterparts in state government." 438 U.S. at 498 (footnote omitted) (emphasis in original). Chief Justice Marshall, in distinguishing the office of the President from that of

the King of England, stated that the President is the federal counterpart to the governor of a state. *United States* v. *Burr,* 25 F. Cas. 30, 34 (C.C. Va. 1807) ("[t]he first magistrate of the Union may more properly be likened to the first magistrate of a state"). Thus, if the chief executive of a state government is entitled to only qualified immunity, there is no basis for asserting that the chief executive of the federal government is entitled to absolute immunity.

The court of appeals decision is also supported by the text of the Constitution itself. The Impeachment Clause provides that an impeached President is liable to routine court process after impeachment. Art. I, § 3, ¶ 7. "By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the president of the routine legal obligations that confine all citizens." *Nixon* v. *Sirica,* 487 F.2d 700, 711 (D.C. Cir. 1973). The court also noted that "[b]ecause impeachment is available against all 'civil Officers of the United States,' not merely against the President, U.S. Const. art. II, § 4, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability." *Id.* at 711 n.50.

Petitioners contend that absolute immunity for Presidents is appropriate because even if citizens have no right of action for violations of constitutional rights, there are "independent safeguards – such as public opinion and the political and impeachment process – that effectively minimize the likelihood of intentional presidential misconduct and that can remedy such misconduct should it arise." (Pet. 19.) The short answer to that argument is that these independent safeguards

failed to deter petitioner Nixon's illegal activities. In the larger context, this argument was implicitly rejected in *Butz* when cabinet officers were denied absolute immunity. They too are subject to public opinion, the political process, and impeachment, but this Court nonetheless ruled that damage actions are an appropriate check on their misconduct. Furthermore, petitioners' position would deprive citizens of personal vindication when their constitutional rights are violated, and this Court has recognized this interest as a significant one. *Butz* v. *Economou, supra,* 438 U.S. at 505; *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

Moreover, by not raising the Title III issues and by acquiescing in a remand for a determination of petitioner Nixon's liability under the statute, the Government apparently concedes that the statutory liability which Congress has imposed in 18 U.S.C. § 2520 applies to former Presidents who violate this law. This being the case there is no basis for the contention that former Presidents nonetheless enjoy absolute immunity when they have violated the Constitution while in office.

4. Even If The Court Decides To Hear Petitioner Nixon's Claim Of Absolute Immunity, It Should Deny The Claim Of Petitioners Kissinger, Mitchell, And Haldeman.

Even if the Court should decide to consider the question of whether a former President is entitled to absolute immunity, there is no reason for the Court to grant the petitions of Kissinger, Mitchell and Haldeman. *Butz* v. *Economou* has definitively held that federal officials from the cabinet rank down enjoy only qualified

immunity, and there is no occasion to review that recent ruling.

There is nothing in *Butz* to suggest that cabinet officials or other high officials, who have qualified immunity, gain absolute immunity by acting in concert with the President. Indeed, the interests of justice require the opposite. If this Court were to hold that Presidents are absolutely immune, then it should permit a person whose constitutional rights are violated to seek redress from others who conspired with the President and not just from lower-ranking agents in the field (who might also claim a derivative immunity). Nothing in the Government's discussion of the reasons for presidential immunity requires that his aides also be immune.

Petitioners' discussion of the issue of immunity for presidential advisors is striking in its failure to mention either Haldeman or Kissinger. Moreover, its description of Mitchell's role as Attorney General misrepresents the basis upon which the district court found him to be liable for damages. Mitchell was not held liable because he advised the President on the legality of warrantless electronic surveillance. The district court held him liable for authorizing the FBI to conduct the surveillance, for failing to direct any minimization of intercepted conversations, for failing to enforce the Justice Department regulations requiring review of such surveillances every 90 days, and for failing to terminate the surveillance when it had not produced any evidence of leaks. (Pet. App. 71a.) Mitchell performed these acts as the nation's chief investigative officer responsible for the FBI — which conducted the surveillance — and not as a legal advisor to the President. The courts of appeals have repeatedly held that prosecutors enjoy only qualified immunity for conduct performed in an investigative capaci-

ty, *Briggs* v. *Goodwin,* 569 F.2d 10, 20 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978), and cases cited therein, and these decisions were left undisturbed in this Court's decision in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976).

5. This Case Is Not In An Appropriate Posture To Consider The Questions Of Qualified Immunity And Non-Retroactivity.

Petitioners contend that they are entitled to judgment because the constitutional rights which they violated were not, in their view, clearly established at the time of the Halperin surveillance and because the rulings of the court of appeals with respect to the Fourth Amendment should not be applied retroactively. These issues are not ripe for review because the court of appeals has remanded the case to the district court for a number of factual determinations which may make unnecessary any consideration of the questions petitioners urge on this Court.

Respondents contend that the surveillance never had a legitimate national security purpose, as the House Judiciary Committee concluded. They also contend that Morton Halperin was selected for surveillance so that Kissinger could bolster his political credibility and that the surveillance was continued to gather information about lawful political activities. Indeed, the court of appeals concluded that there is substantial evidence in the record to sustain these contentions (Pet. App. 26a-28a), and in the present posture of the case, they must be credited.

Surely petitioners do not dispute that it was settled constitutional doctrine that wiretaps conducted for

political purposes violate the Fourth Amendment. Insofar as the district court's factual determinations on remand sustain respondents' view of the wiretap, petitioners' actions would not be entitled to qualified immunity as a matter of law, nor would any questions of retroactivity arise. More importantly, if the district court finds on remand that the surveillance violated Title III, there will be no reason to reach the question of the state of Fourth Amendment law in 1969-71. In this regard, it is important to remember that the court of appeals Fourth Amendment rulings only come into play "for any period during which the District Court concludes that the surveillance was genuinely based on national security concerns." (Pet. App. 31a.)

With respect to their rulings on minimization, both the district court and the court of appeals were clearly correct in ruling that it was settled constitutional doctrine in 1969 that the reasonableness standard of the Fourth Amendment applied to all wiretaps, including those for national security purposes. Minimization has been a recognized element of Fourth Amendment reasonableness at least since this Court's decision in *Berger* v. *New York,* 388 U.S. 41 (1967). In that case, the Court held that in order to be reasonable under the Fourth Amendment, a wiretap must be limited in scope and that the seizing of all communications of all persons using a telephone regardless of their relation to the purpose of the surveillance is not permissible. *Id.* at 59.

The only open question with respect to legitimate national security wiretaps has been whether they require a warrant, not whether they require reasonable efforts at minimization. In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court ruled that the Fourth Amendment applies to all electronic surveillance. In so

ruling, the Court reserved the question of whether a warrant is necessary to satisfy the Fourth Amendment in national security wiretaps. *Id.* at 358 n.23. ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.") *See id.* at 363-64 (Mr. Justice White concurring). In all other respects the Fourth Amendment requirement of reasonableness has applied to national security wiretaps since 1967.

Contrary to what the Government asserts, *United States* v. *United States District Court,* 407 U.S. 297 (1972) ("Keith"), did not suggest that the application of the reasonableness requirement to national security wiretaps was an open question. That opinion dealt only with part of the question left open by *Katz,* namely, whether a warrant was required for internal security surveillances, and did not deal with the question of what the reasonableness requirement of the Fourth Amendment required apart from a warrant. Its discussion of possible alternative standards, upon which petitioners rely (Pet. 24-25), related to standards for a Congressionally authorized judicial warrant. There is nothing in the opinion of the Court to suggest that it was enunciating new doctrine with respect to the reasonableness requirement. Since *Keith* did not rule on the reasonableness issue – which had been previously settled – and since the lower courts did not base their minimization rulings on that case, there is no retroactivity issue in this case at this time.[6]

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[6]If on remand the district court were to award damages based only on the failure to obtain a warrant and if the court of appeals were to uphold the award, questions of qualified immunity as a matter of law and retroactivity might be presented. In that event,

Finally, the passage of the Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-911, 92 Stat. 1797 (FISA), counsels against this Court involving itself in questions of Fourth Amendment law and national security wiretaps prior to 1978. With the passage of this statute, Congress has decided that all wiretaps of United States citizens in the United States must conform to statutorily required warrant and minimization procedures. Now that Congress has acted, this case — while of significance to the parties — is no more than a footnote in the development of electronic surveillance law. The rulings petitioners seek would have no effect on future surveillances or development of the law in this area. Moreover, it is doubtful that any surveillance other than the one in this case fits the factual circumstances which led the lower courts to conclude that a well-established constitutional principle had been violated. Any future surveillance conducted in this manner would be a violation of the FISA and would give rise to statutory damages under that act.

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the Court might then consider whether to hear those questions. At that time the Court might also wish to consider the alleged conflict between the court of appeals opinion in this case and *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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